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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

Nos. [redacted], 21, 22, 32

THE UNITED GAS IMPROVEMENT COMPANY, LONG ISLAND LIGHTING COMPANY, AND PHILADELPHIA ELECTRIC COMPANY, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, FEDERAL POWER COMMISSION,

Petitioners,

v.

CALLERY PROPERTIES, INC., J. R. FRANKEL, MARGARET HUNT HILL, TRUSTEE, J. RAY McDERMOTT & CO., INC., OCEAN DRILLING & EXPLORATION COMPANY, PLACID OIL CO., CAROLINE HUNT SANDS AND LOYD B. SANDS, AND THE SUPERIOR OIL COMPANY,

Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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INDEX

	Page
Citation to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement	3
Argument	7
Conclusion	16

CITATIONS

Cases

Atlantic Ref. Co. v. *Public Serv. Comm'n*, 360 U.S. 378 (1959)	7
Continental Oil Co., et al, 27 FPC 96 (1962)	9
Federal Power Commission v. *Hunt*, 376 U.S. 515 (1964)	12
Public Serv. Comm'n v. *FPC*, 329 F. 2d 242, (D.C. Cir., 1964, *cert. denied sub nom. Prado Oil & Gas Co.* v. *FPC*, 377 U.S. 963	9, 11, 14
Public Serv. Comm'n v. *FPC*, 287 F. 2d 146 (D.C. Cir. 1960), *cert. denied* 365 U.S. 880	7-8
Skelly Oil Co., et al, 28 FPC 401 (1962)	9
United Gas Pipe Line Co., et al, 30 FPC 329 (1963)	9

Statutes

15 U.S.C. 717f (c)	2
15 U.S.C. 717f (e)	2
28 U.S.C. §1254(1)	2

Miscellaneous

King Lear, Act V, Scene 3, Shakespeare	8

In The

Supreme Court of the United States

October Term, 1964

Nos. 671, 678 & 756

The United Gas Improvement Company, Long Island Lighting Company, and Philadelphia Electric Company, Public Service Commission of The State of New York, Federal Power Commission,

Petitioners,

v.

Callery Properties, Inc., J. R. Frankel, Margaret Hunt Hill, Trustee, J. Ray McDermott & Co., Inc., Ocean Drilling & Exploration Company, Placid Oil Co., Caroline Hunt Sands and Loyd B. Sands, and The Superior Oil Company,

Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

CITATION TO OPINIONS BELOW

The opinion and judgment of the Court of Appeals for the Fifth Circuit are reported at 335 F. 2d 1004 and the opinion is attached as Appendix B to Ocean Drilling & Exploration Company's (ODECO's) Petition for Writ of Certiorari in No. 714.

JURISDICTION

The judgment of the Court of Appeals was entered on August 14, 1964. Jurisdiction of this court is invoked under 28 U.S.C., § 1254(1). By order dated December 9, 1964, the time within which ODECO was to file its reply to the Petitions for Writ of Certiorari filed by the Petitioners was extended to January 11, 1965.

QUESTIONS PRESENTED

1. Whether, in certificate proceedings under § 7 of the Natural Gas Act, the Federal Power Commission may refuse to admit and consider probative cost and economic evidence adduced by producers in support of their initial contract prices.

2. Whether the Commission under § 7 of the Natural Gas Act may issue a permanent certificate of public convenience and necessity with a condition attached forbidding the producer from filing contractually authorized rate increases pursuant to § 4 of the National Gas Act.

3. Assuming that the Federal Power Commission has authority under § 7(e) of the Natural Gas Act to require producers to refund amounts previously collected pursuant to unconditional permanent certificates, is the Commission required to exercise such authority without considering the equities, the applicable just and reasonable price and any other pertinent factors?

STATUTES INVOLVED

This case involves primarily § 7(c) and 7(e) of the Natural Gas Act, 15 U.S.C., § 717f(c) and 717f(e). These sections of the Act are set out in Appendix A attached to ODECO's Petition for a Writ of Certiorari in No. 714.

STATEMENT

ODECO has filed a Petition for Writ of Certiorari in No. 714 asking that certiorari be granted with respect to the holding of the court below that the Commission has authority to require "retroactive refunds" of amounts previously collected under ODECO's unconditional permanent certificates and filed rate schedules. The Federal Power Commission has filed a Petition for Writ of Certiorari in No. 756 asking that certiorari be granted with respect to the holdings of the court below (1) that relevant cost and economic evidence must be admitted and considered in a § 7 certificate proceeding, (2) that the Commission may not impose a price moratorium on permanent certificates forbidding the filing of contractually authorized rate increases pursuant to § 4 of the Natural Gas Act, and, (3) that under the unique circumstances of this case refunds of amounts previously collected by ODECO in excess of any valid price condition imposed by the Commission cannot automatically be required but "can be determined only after the 'just and reasonable' rate is fixed by an appropriate § 4 or § 5 proceeding." 335 F. 2d at 1019. Likewise, the Public Service Commission of the State of New York in No. 678 and the United Gas Improvement Company, Long Island Lighting Company and Philadelphia Electric Company[1] in No. 671 are seeking certiorari on substantially the same questions presented in the Federal Power Commission's petition.

This memorandum brief is filed in response to the Petitions for Writs of Certiorari filed by the Federal Power Commission and the Intervenors in Nos. 671, 678 and 756.

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[1] Hereafter referred to collectively as Intervenors.

Since six Petitions for Writ of Certiorari[2] complaining about various portions of the judgment below have been filed, each with a statement of the history of these proceedings, this brief will not restate the background of this controversy. Reference is made to ODECO's petition in No. 714 as accurately portraying the history of the proceedings culminating in the decision below. Therefore, the comments below will be directed to certain facets of the present controversy which do not appear in any of the other petitions.

ODECO sought review of the Commission's imposition of four principal conditions on the permanent certificates issued to it by the orders under review; i.e., FPC Opinion Nos. 398 and 398-A. The four certificate conditions to which ODECO objected were the reduction in the initial contract price from 21.5¢ per Mcf, plus tax reimbursement of 2.05¢ per Mcf, to an initial price of 18.5¢ per Mcf, plus tax reimbursement of 1.5¢ per Mcf; the moratorium on the filing of price increases; the requirement that ODECO refund the difference between its initial contract price and the price condition imposed by the Commission, plus interest; and the condition making the take-or-pay-for clauses in ODECO's

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[2] Eight separate petitions for review seeking the reversal of the Commission's orders in Opinions No. 398 and 398-A were filed in the Court of Appeals for the Fifth Circuit by producer certificate applicants; namely, Callery Properties, Inc. (No. 20,872), J. R. Frankel (No. 21,028), Margaret Hunt Hill, Trustee (No. 20,892), J. Ray McDermott & Co., Inc. (No. 20,967), Ocean Drilling & Exploration Company (No. 20,989), Placid Oil Company (No. 20891), Caroline Hunt Sands and Lloyd B. Sands (No. 20,890), and The Superior Oil Company (No. 20,885). The Public Service Commission of the State of New York, the United Gas Improvement Company, Long Island Lighting Company and Philalelphia Electric Company intervened in the proceedings in the court below in support of the Commission's orders. The Petitioners in Nos. 671, 678 and 756 have named all of the producers as Respondents. J. R. Frankel and J. Ray McDermott & Co., Inc., have filed a Petition for Writ of Certiorari in No. 769. The Superior Oil Company has filed a Petition for Writ of Certiorari in No. 776 and the Respondent ODECO has filed a Petition for Writ of Certiorari in No. 714.

contracts subject to a future order in a pending rule-making proceeding. With regard to the initial price condition, ODECO complained that the Commission committed serious error in determining the so-called "in-line" price because it arbitrarily and without justification disregarded all prices above 18.5¢ per Mcf.[3] In fact, ODECO devoted seven pages in its brief below to the errors committed by the Commission in determining the "in-line" price and, pursuant to agreement among the producers, ODECO's counsel in oral argument before the court below explained the errors in the Commission's "in-line" price determination. Of course, ODECO also complained of the Commission's error in excluding all cost and financial evidence.[4]

The court below agreed with ODECO's position, that all cost and economic evidence should not have been excluded. However, the court below then stated that, in view of its holding that the cost and economic evidence should not have been excluded, it did not reach the question of the errors in the "in-line" price determination.

The Fifth Circuit further stated that the "in-line" price aspects were open for rehearing and redetermination when

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[3] ODECO's objections were directed to the Commission's determination of an 18.5¢ per Mcf base price and to its determination of a tax reimbursement allowance of 1.5¢ per Mcf.

[4] ODECO recognizes the right of the Commission to make a proper "in-line" price determination as one of the evidentiary criteria to be considered in determining whether ODECO's proposed initial contract price is consistent with the present and future public convenience and necessity. However, it is ODECO's position that such an "in-line" price determination is not the *sine qua non* of a producer certificate case, and if the Commission should determine that ODECO's contract price is not "in-line", then the Commission was required to receive and consider the proffered cost and economic evidence to determine if such evidence provided the necessary further justification to support unconditional certification.

the case returned to the Commission for a proper hearing, 335 F. 2d at 1021. It is unfortunate that the court did not reach the question of the errors in the Commission's "in-line" method since a complete understanding of the serious error committed by the Commission in excluding all cost and economic evidence cannot be reached by simply examining the abstract question of the admission of evidence. It is also necessary to examine what the basis for the decision is without the excluded evidence. The Commission by a footnote in its Petition (fn. 14, p. 15) states that if certiorari is granted it will set forth reasons for believing that the Commission's method of determining the "in-line" price was proper and that no remand on this point is necessary. However, the fact remains that the Court did not reach the question, so that ODECO and the Commission were not aggrieved by the court's holding on this point, and thus no error was presented which could be the proper basis for a Petition for Writ of Certiorari. If certiorari is granted and the Court should reverse the decision below on any or all of the questions presented by the Commission and Intervenors, the case would then have to be remanded to the court below to review the substantial error in the Commission's "in-line" price determination.[5]

ODECO, in the court below, also alleged that the Commission committed error in requiring interest on the amount of refunds that were ordered. Once again, since the court below found that the Commission improperly ordered refunds, it did not "express any views as to interest or the rate, if interest is to be allowed." 335 F. 2d at 1020, fn. 57.

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[5] Including the errors alleged in its determination of the base price and tax reimbursement.

ARGUMENT

The Court Below Properly Held That Cost-Type, Economic and Financial, Cost-of-Service, and Supply and Demand Evidence, Both on An Individual and An Area-Wide Basis was Admissible In a Section 7 Producer Certificate Case.

1. The court below pointed out, "These are all fallout from *CATCO* in which the Supreme Court reversed the unconditional certificate because the 21.4¢ price was 'out-of-line' "[5a] and then noted, (335 F. 2d at 1012):

> "As though Catco began and ended with 'in-line', the Commission and the intervenor-distributors are mesmerized by this catch phrase into supposing that the Commission's responsibility is discharged with that limited inquiry and if unsatisfied on that score, it is free to reject out of hand a producer's application for a new service."

This Court characterized the record in *CATCO*[5b] as containing little more information than was included in the printed contracts and expressed surprise that evidence, if available, was not introduced as to the relative costs of production from adjoining submerged areas. The fatal defect in *CATCO* was the lack of sufficient evidence to support the Commission's unconditional certification of the producers' initial prices.

Following this same rationale the Court of Appeals for the District of Columbia remanded FPC Opinion No. 327 in which the Commission had permanently certificated the subject sales by ODECO at the initial contract price of 21.5¢ per Mcf plus tax reimbursement of 2.05¢ per Mcf. *Public*

[5a] 335 F. 2d at 1007.
[5b] *Atlantic Ref. Co.* v. *Public Serv. Comm'n*, 360 U.S. 378 (1959).

Serv. Comm'n v. *FPC*, 287 F. 2d 146 (D.C. Cir. 1960) *cert. denied* 365 U.S. 880 (1961). The court pointed out that, "The *Catco* decision does not prescribe the standard of proof which must be satisfied to support an unconditional certification" 287 F. 2d at 150. However, the court expressly rejected the Commission's sole reliance on "numerous other certified sales in the area" and held that ODECO's proposed initial prices fell "within the *Catco* rule, and hence cannot be unconditionally certificated by the Commission without the supporting evidence which that case requires". 287 F. 2d 149. The court of appeals then remanded the case for "further proceedings in which the producer applicants may, if they choose, either augment the record so as to support certification without price condition, or seek a certification appropriately conditioned." 287 F. 2d at 150.

At the hearings after remand ODECO sought to introduce evidence to explain the "reason why" its initial price of 21.5¢ per Mcf was justified but such evidence was summarily rejected. Thus, through this appeal the "wheel has come full circle".[6] This Court's *CATCO* decision reversed Commission certification of sales of natural gas from Southern Louisiana because the record evidence was inadequate to support the proposed initial prices. The D. C. Circuit reversed the original unconditional certification of ODECO's sales for the same reason. However, on remand the Commission disregarded the holding in *CATCO* and the mandate of the D. C. Circuit and relied exclusively on "other certified sales in the area" to support its price condition. Now this Court is once again faced with a record that contains little more information than that contained in the printed contracts. The only difference is that in *CATCO* the producers were supporting the Commission's

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[6] *King Lear*, Act V, Scene 3, Shakespeare.

decision at a 21.4¢[7] level by reference to other certificated prices. Now the "shoe is on the other foot", and on the basis of the same type of evidence the intervenors are supporting the Commission's record at an 18.5¢ per Mcf level. After five long years and thousands of dollars of expense, it became the duty of the court below to order the Commission, as the D. C. Circuit did in 1960, to hold a proper hearing for consideration of the supporting evidence required by *CATCO*.

2. The basic argument of the Commission and the Intervenors in support of granting certiorari is that if the Commission must allow any evidence into the record in a producer certificate case other than that contained in the printed contracts, an administrative monstrosity will result and that, therefore, for administrative convenience all such evidence should be excluded. Despite the self-serving declarations by the Commission in some of its opinions, this simply is not so. The Commission admitted the type of evidence in dispute in the proceedings underlying Opinion No. 351,[8] in Opinion No. 362[9] and in Opinion No. 399.[10] The evidence was received and thoroughly cross-examined without creating a "monstrosity".

The Commission and the Intervenors would have this Court believe that the separate certificate application of each producer would create a "full blown" rate case if cost and economic evidence were admitted. But this is not what

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[7] The sales involved in *CATCO* were from offshore leases and not subject to State of Louisiana taxes. Therefore, no tax reimbursement was applicable.

[8] 27 FPC 96 (1962). This is the decision of the Commission in the *CATCO* case after remand by this Court.

[9] 28 FPC 401 (1962). This decision resulted in *Public Serv. Com'n.* v. *FPC*, 329 F. 2d 242 (D.C. Cir. 1964) *cert. denied sub. nom. Prado Oil & Gas Co.* v. *FPC*, 377 U.S. 963.

[10] 30 FPC 329 (1963).

happens in a typical Section 7 proceeding. For example, the instant case began with sixty-nine certificate applications of which there are only twelve left contesting the Commission's decision. The remainder have been settled or the producers have accepted the prices given to them by the Commission. Under current Commission procedure, there are typically between sixty and eighty applications from a contiguous geographical area set for hearing at the same time in a consolidated proceeding.[10a] Out of this number there are usually not more than a dozen producer counsel in any one hearing. The majority of the evidence is presented on a joint basis by the producers i.e., the producers all support the same witness. The producers are not in favor of expensive and protracted hearings. It costs thousands of dollars to make these presentations and most of the small producers simply cannot afford to participate in such hearings and must take the price offered by the Commission. The group that is burdened most by having evidence other than that contained in the printed contract admitted are the producers for they have the burden of proof in a Section 7 proceeding and typically, most of the evidence in the proceeding is prepared and paid for and presented by the producers.

3. To a limited degree all of the petitions filed by the Commission and Intervenors, but particularly the petition in No. 678 filed by New York, attempt to leave the impression that the producers can have the rejected evidence heard and cross examined in the area rate proceedings currently in progress, so that upholding the Commission's position that the evidence should not be admitted in a § 7 proceeding would not result in the producers' never "having their day in court." Nothing could be further from the truth. *All* cost

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[10a] There are even fewer certificate *applicants* involved because, as in the present case, one producer will have several certificate *applications* consolidated in the same hearing.

and economic evidence relating to individual producers is being systematically excluded by the Examiner in the Southern Louisiana Area Rate Proceeding, and was excluded by the Examiner in the Permian Basin Area Rate Proceeding. Therefore, if not received in certificate proceedings, evidence relating to individual circumstances will never be heard in any proceeding before the Commission, so that the Commission will never know whether the price which it sets in a § 7 or § 4 proceeding is adequate to meet a particular individual producer's financial requirements.

4. The Commission and the Intervenors rely upon an alleged conflict between the D. C. Circuit's decision in *Public Serv. Comm'n* v. *FPC*, 329 F. 2d 242 (D.C. Cir., 1964), *cert. denied sub nom., Prado Oil & Gas Co.* v. *FPC*, 377 U.S. 963 and the decision below. No such conflict exists. It should be noted that in *Skelly* the limited cost evidence was received and cross examined and actually considered by the Commission, whereas in the present case the cost and economic evidence was excluded from the outset and never tested by cross examination. Thus, the statements of the court in *Skelly* as to the admissibility of such evidence were obviously dictum and not essential to the court's ultimate holding in that case. By contrast, the principal holding of the court below is that "a proper consideration of the Act and its elucidation in *Catco* demonstrates that the Commission erred in rejecting the proffered evidence on cost and other economic data." 335 F. 2d at 1010.

Another crucial difference is that *Skelly* involved a question of the weight to be given evidence received in the record and cross examined, whereas the present case is concerned with the threshold question of whether cost and economic evidence is admissible in a § 7 certificate proceeding. In *Skelly* the D. C. Circuit was careful to state it was not holding that "the Commission may never consider such

evidence if the circumstances in a particular case move it to do so consistently with its obligation under *Catco.*" 329 F. 2d 247. ODECO submits that the unique circumstances of this case, as recognized throughout the opinion of the court below, clearly justify — in fact require — the admission and consideration of the proffered cost and economic evidence. Finally, the court below evidently did not believe there was any conflict for it cited *Skelly* in its decision without attempting to discuss or distinguish the dictum in *Skelly* as to the Commission's failure to give sufficient weight to the cost evidence in that case. In summary, the decision below is correct and consistent with *CATCO,* and since no conflict exists certiorari on the evidence question should be denied.

The Court Below Properly Held that the Imposition of a Price Increase Moratorium Was Improper.

5. The court below construed this Court's opinion in *FPC* v. *Hunt,* 376 U.S. 515, (1964), as compelling the holding that the Natural Gas Act forbids a moratorium on contractually authorized price increases as a condition to the issuance of a *permanent* certificate. ODECO submits that since this Court has already decided the moratorium issue during the last term in the *Hunt* decision and since the Petitioners are unable to distinguish that case certiorari should be denied.

6. The court below disposed of the price moratorium issue by simply referring to this Court's *Hunt* decision and therefore found it unnecessary to discuss the further reason why the Commission improperly imposed a price moratorium on the certificates granted to the producers. In the court below ODECO contended that there was not one single shred of evidence in the record to support the imposition of a price increase moratorium. There was no evidence that any triggering of prices would occur if price increases were filed above the 23.55¢ level. None of the witnesses in the hearing discussed the effect of these prices in that range and it never occurred to the producers that the Commission even contemplated the imposition of such an onerous condition. No one in the court below refuted this contention. Thus, assuming *arguendo* that *Hunt* did not forbid the imposition of a price increase moratorium, the decision below should be sustained because in this case such certificate condition is not supported by substantial evidence or soundly based findings in the record.

The Court Below Erroneously Held That the Federal Power Commission Had The Power to Order Retroactive Refunds.

7. There are four conflicting views on the question of whether the Federal Power Commission may order retroactive refunds in a Section 7 certificate proceeding. ODECO takes the position that the Commission is not empowered under the Natural Gas Act to order retroactive refunds of amounts collected pursuant to unconditional *permanent* certificates, particularly under the circumstances of this case, as is more fully discussed in their petition in No. 714.

The Commission and the Intervenors take the position that not only does the Commission have the statutory power to require retroactive refunds in this case, but that refunds are an absolute requirement regardless of the equities, the applicable just and reasonable price, etc. The D. C. Circuit in *Skelly*[11] was confronted with the more typical situation of one price being collected pursuant to unconditional temporary certificates and a lower price condition being imposed at the time of permanent certification. The D. C. Circuit in *Skelly* held that the Commission had the power to order refunds but that the Commission must view the equities involved to determine the amount, if any, which must be refunded by the producers.

The court below did not adopt any of the foregoing positions but held that in the unique circumstances of this case, i.e. the producers collected the prices provided for in their permanent certificates which were later invalidated on appeal, that the Commission had the power to order refunds but that such refunds "can be determined only after the 'just and reasonable' rate is fixed by an appropriate § 4 or § 5 proceeding." 335 F. 2d at 1019. The court reasoned that under the Act the consumers were not entitled to gas at a rate less than a just and reasonable rate and to order refunds without determining the just and reasonable rate could cause an undeserved windfall for favored customers.

8. The Commission and the Intervenors object to the requirement of the court below that refunds can only be determined after the Commission finds the just and reason-

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[11] *Public Serv. Comm'n* v. *FPC*, 329 F. 2d 242 (D.C. Cir. 1964) *cert. denied sub nom. Prado Oil & Gas Co.* v. *FPC*, 377 U.S. 145.

able rate. However, the Commission in its petition has framed the question upon which it asks this Court to grant certiorari in terms of power and authority rather than in terms of "method". Regardless of the wording in the various petitions, there are two distinct questions which this Court is being asked to decide if certiorari is granted. In No. 714 ODECO raises the question of whether the Commission has *authority* under Section 7(e) of the Natural Gas Act to require refunds of amounts previously collected pursuant to its unconditional permanent certificates and filed rate schedules. In Nos. 671, 678 and 756 the Commission and Intervenors assume the existence of such authority and ask whether the court below was correct in determining how this authority should be exercised.

ODECO's petition details the reasons why it believes certiorari should be granted in No. 714 as to the Commission's authority under Section 7(e) of the Act to require retroactive refunds. However, assuming the existence of such power, the granting of certiorari on the question of the manner in which it is to be exercised does not appear to be warranted — particularly in the unique circumstances of this case. Even *Skelly* would not condone the Commission's action in this case in automatically requiring refunds without consideration of the equities, the applicable just and reasonable rate, etc. However, ODECO recognizes that if certiorari is granted with respect to its petition in No. 714 the Court may wish to consider the entire refund question, including both the questions of authority and the manner in which it is to be exercised.

CONCLUSION

For the foregoing reasons, the Petitions for Writs of Certiorari in Nos. 671, 678 and 756 should be denied except insofar as the Court may deem it appropriate to consider the entire refund question.

Respectfully submitted,

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